

A **MALVINDER KAUR JASWANT SINGH v.**
AVINDER SINGH KARNAIL SINGH & ORS

HIGH COURT MALAYA, SHAH ALAM
HAYATUL AKMAL ABDUL AZIZ JC
B [ORIGINATING SUMMONS NO: 24F-11-01-2017]
10 DECEMBER 2017

CIVIL PROCEDURE: Contempt of court – Breach of consent order – Husband and wife entered into consent order regarding custody, care and control of child – Husband initiated committal proceedings against wife due to breach of consent order
C – Wife applied to vary consent order before committal proceedings could be heard – Whether wife’s application ought to be allowed – Whether contempt of consent order had been purged – Rules of Court 2012, O. 52 r. 2(1)

D The plaintiff and the first defendant were legally married and were blessed with a son. According to the plaintiff, one day, the first defendant came to the son’s kindergarten and took him away and the plaintiff had not seen the son since then. *Via* an originating summons, the plaintiff applied for sole custody, care and control of the son and the first defendant not to be given access to the son until the disposal of the originating summons. The plaintiff and the first defendant then mutually entered into a consent order where,
E *inter alia*, the parties agreed that the custody, care and control of the son be given to the plaintiff while the first defendant was given the right of access (‘the consent order’). However, the first defendant claimed that the plaintiff failed to comply with the consent order by refusing him access to the son. The first defendant was successful in his application for leave of committal against the plaintiff but before the committal proceedings could be heard, the
F plaintiff applied to vary the consent order *via* encls. 46 and 54. The first defendant applied to dismiss the application by the plaintiff (‘encl. 51’) by arguing that (i) encls. 46 and 54 could not be heard until the plaintiff purged her contempt of the consent order; and (ii) the applications had no legal basis
G as there were no material changes to the circumstances to justify any variation, pursuant to s. 96 of the Law Reform (Marriage and Divorce) Act 1976.

Held (allowing encl. 51):

H (1) The plaintiff’s application, as contained in encls. 46 and 54, were subsequent in time to the contempt proceedings against her. The intent of the application, if granted before the conclusion of the committal proceedings, would carry an effect of stifling or negating the said proceeding as the order from which the said contemptuous act arises would be extinguished by the variation order. Order 52 r. 2(1) of the Rules of Court 2012 is clear in its intent; until the contempt has been
I purged, the court, in the exercise of its judicial discretion can refuse to hear any application in the proceedings by the contemnor. The plaintiff had yet to purge her contempt and remained defiant in her contumacious conduct. (para 22)

- (2) The plaintiff's attempt to exonerate herself from the committal proceedings did not contain cogent materials of probative value to free her of the charges levelled against her. The terms of the consent order had been expressly agreed to by the parties. Prior to the committal proceedings, no application was made to vary the consent order. The terms of the consent order remained and must be obeyed and honoured by the parties. (para 23) A
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- (3) The material presented by the plaintiff did not provide the required justification or cogent reason for the court to exercise its judicial discretion to depart from the general rule. The court refused to hear or consider the merits of the application by the plaintiff while her contumacious conduct remained unpurged. The plaintiff was in contempt of court but, considering the need of the son, was spared incarceration. The plaintiff was reprimanded for her contumacious conduct and was strongly warned not to repeat such disrespectful conduct to the court. (paras 24 & 25) C
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Case(s) referred to:

- Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor* [2006] 1 CLJ 60 HC (*refd*)
- Asia Pacific Parcel Tankers Pte Ltd v. Pemilik Kapal "Normar Splendour"* [2001] 1 LNS 5 HC (*refd*)
- ESPL (M) Sdn Bhd v. Harbert International Est Sdn Bhd* [2003] 1 LNS 715 HC (*refd*) E
- MBB v. Charterfield Corporation Sdn Bhd* [2001] 3 AMR 3686 (*refd*)
- MG v. EC* [2013] 4 BLR 346 (*refd*)
- Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371 HC (*refd*)
- Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 SC (*refd*)
- YCC v. LSY* [2007] 7 CLJ 207 HC (*refd*) F
- Yeoh Ken Lee, Kelvin v. Liew Chooi Hoong* [2005] 5 CLJ 408 HC (*refd*)

Legislation referred to:

- Law Reform (Marriage and Divorce) Act 1976, s. 96
- Rules of Court 2012, O. 52 r. 2(1)

- For the plaintiff - R Kandiah; M/s Mohd Latip & Ass* G
- For the 1st defendant - Vignesvary Alahakone; M/s Alahakone & Co*

Reported by Najib Tamby

JUDGMENT

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Hayatul Akmal Abdul Aziz JC:

Introduction

- [1] The plaintiff wife ("PW") and the defendant husband [(first defendant) - ("DH")] had in between them filed several applications for this court's consideration, arising from the same subject matter, ie, a consent order ("the said consent order") entered by parties on 8 February 2017 (encl. 30). I

- A [2] DH filed an application on 26 June 2017 to cite PW for contempt and to commit her to prison for failure to comply with the said consent order after the required leave was granted on 24 April 2017. However, before the said committal proceedings could be heard and determined, four interlocutory applications were filed by both parties, subsequent to which, decisions were delivered by this court on 15 August 2017, as follows:
- B (a) Enclosure (46) - PW's application (filed on 8 August 2017) to vary the said consent order. This application was dismissed by this court and an appeal was filed against this decision (the present appeal).
- C (b) Enclosure (54) - PW's application (dated 28 August 2017) to amend the notice of application (encl. 46). This application was dismissed by this court and an appeal was filed against this decision (the present appeal).
- D (c) Enclosure (51) - DH's application (filed on 28 August 2017) to dismiss the applications filed by PW, ie, (encl. 46 and encl. 54). This application was allowed by this court and no appeal was filed against this decision.
- (d) Enclosure (57) - PW's application (filed on 8 September 2017) to amend the notice of application (encl. 46). This application was dismissed by this court and no appeal was filed against this decision.
- E [3] The relevant cause papers and written submissions, are as follows:
- (a) Enclosure 30: The said consent order dated 8th February 2017;
- (b) Enclosure 46: Application dated 7th August 2017, filed by PW to vary the said consent order;
- F (c) Enclosure 47: PW's affidavit in support affirmed by Malvinder Kaur a/p Jaswant Singh on 7th August 2017;
- (d) Enclosure 53: The DH's affidavit in reply affirmed by Avinder Singh a/l Karnail Singh on 28th August 2017;
- G (e) Enclosure 54: Application dated 17th August 2017, to amend enclosure 46;
- (f) Enclosure 58: Affidavit in support of enclosure 54 affirmed by Ms Rasamani a/p Supper Kandiah on 17th August 2017. (It is to be noted that Ms R Kandiah is the solicitor acting for the PW).
- H (g) Enclosure 51: Application dated 28th August 2017, filed by DH to dismiss PW's application at enclosure 46 and 54 (enclosure no. 49 was amended orally to enclosure no. 54);
- (h) Enclosure 52: The DH's affidavit in support affirmed by Avinder Singh a/l Karnail Singh on 28th August 2017;
- I (i) Enclosure 62: PW's written submission;
- (j) Enclosure 64: DH's written submission.

[4] The above applications were heard simultaneously before me on the 6 October 2017 and after perusing the cause papers filed, respective written submissions of the parties, I allowed the application by DH (encl. 51) which resulted in the dismissal of encls. 46, 54 and 57 filed by PW with no order as to cost. Dissatisfied, PW had filed this appeal (against encl. 46 and encl. 54 only) and my reasons are as follows:

Brief Facts

The brief facts disclosed from the cause papers are as follows:

[5] PW and DH were legally married on 8 August 2014 and are blessed with a son name Darenveer Singh Cheema a/l Avinder Singh (“the said son”) born on 27 January 2016 (1+ year).

[6] PW had on 10 January 2017, filed an originating summons [(OS) - (encl.1)] applying for sole custody, care and control of the said son and DH not to be given any access to the said son until the disposal of this OS (*inter parte*). PW alleged that she was always abused by her mother-in-law and she never received any support from DH. While staying at the in-law’s house, PW alleged that she had to pay her mother-in-law RM1,000 for taking care of the said son whereas DH only paid RM500. Subsequently, she found out that DH was the one using the said RM1,000 given to the mother-in-law. On 28 December 2016, PW further alleged that DH came to the said son’s kindergarten and took him away where the care taker had lodged a police report regarding the incident. PW alleged that she had not seen her son since then.

[7] On 8 February 2017, PW and DH had mutually entered into the said consent order whereby, among others, parties agreed that the custody, care and control of the son be given to PW and DH is given the right of access which details are as per para. (e) of the said consent order. Consequently, PW agreed to withdraw her action against the second and third respondents while DH is to pay a certain amount for maintenance for the said son.

[8] DH claimed that PW had failed to comply the said consent order by refusing to grant him access to the said son as ordered. On 24 April 2017 DH filed an *ex parte* application for leave for committal (encl. 32) against PW and leave was granted by this court. On 26 June 2017, DH filed this application for committal against the RW (encl. 37).

[9] Before the committal proceeding could be heard by this court, rather than focusing on exonerating herself from committal, RW had filed the above applications (encls. 46 and 54) to vary the said consent order.

The Submissions Of The Defendant Husband (DH)

[10] Learned counsel for DH submitted that encl. 46 to vary the said consent order was filed after DH had filed his committal proceedings against PW for non-compliance with the said consent order. On 8 August 2017 when

A both parties appeared before the court, PW had sought an adjournment to file an affidavit in reply for the committal proceedings which was granted by this court. However, instead of filing the affidavit in reply, PW's learned counsel proceeded to file and served encls. 46 and 54 to vary the said consent order.

B [11] Learned counsel for DH raised a preliminary objection that encl. 46 and 54 cannot be heard until the contemnor purges her contempt (of the said consent order). It was argued that PW's application to vary the said consent order has no legal basis as there is no material changes to the circumstances to justify any variation, pursuant to s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ("the said Act"). It was duly pointed out
C by the said learned counsel that PW was represented by the same counsel and was advised on the terms of the said consent order and in the circumstances, PW has no excuse now to seek changes nor state that her intentions were otherwise. While on the other hand, DH had complied with the terms of the said consent order. Therefore, learned counsel submitted that encl. 46 must
D be dismissed with costs since PW is not able to substantiate any material changes in the circumstances that necessitate the variation of the said consent order under the said Act.

[12] Regarding encl. 54, learned counsel for DH argued that the application to amend encl. 46 was supported by an affidavit affirmed by the solicitor for
E PW herself and not PW. The said learned counsel raised a preliminary objection because PW's counsel stated that the facts are within her personal knowledge, but nowhere did she state that she has a mandate to affirm the said affidavit for and on behalf of PW. The said solicitor for PW had apparently affirmed on behalf of PW that it's the intention of PW to
F reconcile with DH when the same could not be supported with any kind of evidence from either party and that it was PW herself who demanded for a divorce from the very outset.

[13] Learned counsel for DH further argued that in the absence of an express mandate to affirm the alleged facts in the said impugned affidavit,
G would render its contents to be not the words of PW but merely the conjectures and opinions of the said learned solicitor for PW who is not the party to this proceeding. The said learned solicitor's deposition that DH can only have overnight access to the said son only upon the said son attaining the age of seven years old cannot be held to be the position of PW in the
H circumstances thereof.

[14] Learned counsel alluded to me to the case of *MBB v. Charterfield Corporation Sdn Bhd* [2001] 3 AMR 3686, where the court held that:

I There are no express provisions of law relating to this matter; nor is there any provision of law which specifically states that an affidavit such as that in the instant case cannot be accepted by the court. On the authorities, a solicitor may depose an affidavit on behalf of the litigant, provided the following conditions are fulfilled ie:

- (i) The facts to be deposed must not be contentious or disputed questions of fact; A
- (ii) The facts to be deposed must be from his knowledge;
- (iii) The solicitor must have been authorised by the litigant, to depose the affidavit on its behalf. B

[15] Given the circumstances of the case, it is the submitted arguments of learned counsel for DH that the impugned affidavit of PW dated 17 August 2017 affirmed by PW's learned counsel Ms R Kandiah is defective as it had not satisfied any of the above three conditions, in particular condition number two when the said learned counsel had erroneously and unilaterally made a decision on behalf of her client that DH should be entitled to overnight access only when the son turns seven years old without assigning any valid or lawful justifications for such a variation. Consequently, learned counsel prayed that encl. 51 be allowed thereby dismissing encls. 46 and 54 with cost. C

The Submissions Of The Plaintiff Wife (PW) D

[16] Learned counsel for PW argued that DH is aware of the difficulties faced by PW in meeting her obligation to grant access of the said son to DH on every Wednesday from 6pm until 9pm at the Atria Mall in Petaling Jaya. DH is aware that PW works until 5.30pm and due to the constant traffic congestions she would arrive at 6.30pm to fetch the said son from the nursery before proceeding to get the said son ready (washed, fed and dressed) to meet DH. It is submitted that PW had always endeavoured to meet her obligations to honour the terms of the said consent order. On days that she could not make it she would contact DH and arranged for alternative days. It was argued that granting access on every Wednesday at the appointed time is difficult for her and that necessitate the application to vary the said consent order. E

[17] It is further argued by learned counsel for PW that as for the overnight access there was never any mention of the venue in the said consent order. PW therefore suggested the venue for the overnight access to be done in an agreed hotel which PW is willing to pay but allegedly DH had accused her of wanting to sleep with him. It was also further argued that nowhere in the said consent order is it stated that the right for overnight access for DH on alternative Saturday was to be spent at his residence. F G H

The Law

[18] Variation in a nutshell:

The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("the said Act") provides instances where the orders from the court can be varied: I

Section 96 provides as follows:

S. 96. The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the

- A application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.
- [19] Even though consent order can be varied (see *Yeoh Ken Lee, Kelvin v. Liew Chooi Hoong* [2005] 5 CLJ 408) nevertheless, there are plethora of cases
- B that holds a consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. In the case of *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371 where Yeoh Wee Siam J said:
- C [1] A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any material change in the circumstances.
- D [20] In *YCC v. LSY* [2007] 7 CLJ 207, it was held that the husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material change of circumstances to enable the exercise of the discretion to vary to be made.
- E [21] Purging contempt of court in a nutshell:
- (a) Order 52 r. 2(1) of the Rules of Court 2012 (RC 2012) provides that the court has discretion to refuse to hear an appeal or other application in the proceedings by a person in contempt until the said contempt is purged;
- F (b) A litigant's right to be heard is not absolute. A party in contempt is not entitled to the said right until the contempt is purged and till that is done the said right to be heard is postponed. This is a general rule of law. In *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another* [1993] 3 CLJ 210; [1993] 2 AMR 1205, [1993] 2 MLJ 217, Supreme Court held:
- G There is no exception to the general rule that a party in contempt cannot be heard until he has purged his contempt. It is a matter of discretion depending on the circumstances of the case ... Where a litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.
- H (c) The court will not exercise its discretion in favour of a recalcitrant contemnor who treats the court's order with impunity and disrespect (see *Asia Pacific Parcel Tankers Pte Ltd v. Pemilik Kapal "Normar Splendour"* [2001] 1 LNS 5; [2001] 4 MLJ 245). Clement Skinner J in *MG v. EC* [2013] 4 BLR 346 said, that there is no specific exception to the general
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rule that a party in a contempt of court cases cannot be heard until he or she has purged his or her contempt of court. It is within the court's discretion whether to hear the person, even in this case, where the husband's application was to set aside the order the contempt of court issue was based upon. On the facts, Clement Skinner J did not find sufficient justification to exercise his discretion in departing from this general rule. Abdul Malik J in *ESPL (M) Sdn Bhd v. Harbert International Est Sdn Bhd* [2003] 1 LNS 715; [2003] 2 AMR 724 held that the defendant's application to set aside the court order amounts to an abuse of the process of the court and should not be heard until the defendant has fully complied and/or purged its contempt in relation to the said order. Public policy demands strict compliance with the order of the court. It would indeed be a travesty of justice to hear an application by a contemnor when he or she persists in his or her contumacious conduct.

(d) The contemnor's right to be considered was addressed in *Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor* [2006] 1 CLJ 60; [2006] 2 MLJ 61, it was held that:

- (i) the court's position to hear a contemnor should be postponed until the said contempt is purged;
- (ii) it is the exercise of the court's judicial discretion;
- (iii) the court may also refuse to hear other matters if the alleged contemnor's disobedience of the court order makes it more difficult for the court to ascertain the truth or enforce other orders.

Findings Of This Court

[22] It is undeniable that PW's application as contained in encls. 46 and 54 (respectively) are subsequent in time to the contempt proceedings against PW. It is also clear that the intent of the said applications if granted before the conclusion of the committal proceedings would carry an effect of stifling or negating the said proceeding as the order from which the said contemptuous act arises would be extinguished by the variation order. As I have set out above, O. 52 r. 2(1) is clear in its intent, ie, until the contempt has been purged the court in the exercise of its judicial discretion can refuse to hear any application in the proceedings by the contemnor. In the present case, PW has yet to purge her contempt and remains defiant in her contumacious conduct.

[23] The attempt by PW to exonerate herself from this committal proceedings as contained in her affidavit evidence (encl. 47) does not contain cogent materials of probative value to free her of the charges levelled against her. What is clear is that, the terms of the said consent order had been expressly agreed to by the parties with the advice of their respective learned counsel. Prior to this committal proceedings, no application was made to vary the said consent order notwithstanding the alleged difficulties faced by

A PW in obeying the terms of the said consent order. The alleged difficulties if at all should have been addressed before the terms of the said consent order was agreed to and sealed. That notwithstanding, the terms of the said consent order remain and must be obeyed and honoured by the parties.

B [24] By electing to make the application to vary the said consent order after the committal proceeding was instituted against her (rather than before) reflects clearly upon her conduct and the level of importance that her alleged difficulties have taken in the circumstances of the case. I hasten to note that this sort of behaviour is not the kind that an applicant should come to court
C laced with disrespect to the terms of the said consent order as granted by this court. Such a behaviour without any lawful and/or reasonable excuse would be frowned upon. In this respect, I hold that none was offered to the court to excuse such a behaviour. In the circumstances of the case, I held PW to be in contempt of court but in considering the need of the said son I had spared her incarceration. In exercising my judicial discretion I reprimanded
D her for her contumacious conduct and strongly warned her not to repeat such disrespectful conduct to the court.

[25] I find the materials presented before me by PW does not provide the required justification or cogent reasons for me to exercise my judicial discretion to depart from the general rule (see *Wee Choo Keong (supra)*).
E Consequently, I refused to hear or consider the merits of the application by PW as contained in encls. 46 and 54 (respectively) while her contumacious conduct remained unpurged. This court will not exercise its discretion in favour of a contemnor who treats the court's order with impunity and disrespect (see *Asia Pacific Parcel Tankers Pte Ltd (supra)*).

F [26] In the meantime, before the conclusion of the committal proceedings against PW, DH had made an application (encl. 51) seeking to dismiss the applications by PW for variation as found in encls. 46 and 54, respectively. After perusing the parties' respective affidavits, listening to the parties and scrutinising their respective arguments, I agree with learned counsel for DH
G that the said application for variation is a legal manoeuvre largely intended in the circumstances of the case to stifle the committal proceedings against PW where there exist no legal defect or irregularity or unenforceability (of the said consent order). There is no cogent evidence or corroboration of any valid material changes in circumstances presented to this court that
H necessitate a change. I find that the impugned supporting affidavit by learned counsel for PW to be defective and highly irregular for non-compliance with the rules and the law (see *MBB v. Charterfield Corporation (supra)*) and such fundamental non-compliance is incurable in the circumstances of the case. Consequently, the said impugn affidavit can be disregarded by this court and
I therefore as a result thereof there is no supporting affidavit for encl. 54 to be anchored to.

[27] It is my considered view that even though acting legal counsel representing client by law may depose affidavits on behalf of their client if the three conditions in *MBB v. Charterfield Corporation (supra)* are met, however it would be most prudent to avoid doing so (unless under most extenuating circumstances), as such affidavit may end up being the centre of the legal dispute which could place the said acting counsel in a difficult and conflicting position of having to defend the said affidavit for the client while at the same time having to defend him/herself in the legal proceeding. It would in the circumstances require prudence on the part of learned acting legal counsel.

Conclusion

[28] Considering the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed the application by DH (encl. 51) which resulted in the dismissal of the application in encl. 46, 54 and 57 (respectively) with no order as to cost. PW is at liberty to file afresh when there is legitimate change in circumstances as required by law.

[29] It is to be observed however, that at the time of writing of this judgment, notwithstanding the mercy and leniency granted by this court, PW remains defiant in her disobedience to the said consent order for which she is now held to be in contempt in the face of the court. I have directed learned counsel for PW to ensure PW's presence in court on the next date (9 January 2018) together with the said son to determine her contumacious conduct to this court. Failure to comply with this order, a warrant of arrest will be issued against PW.

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